Lafayette Grinding Corp. *and* Metal Local 485, International Union of Electronic, Electrical, Technical, Salaried and Machine Workers, AFL–CIO. Cases 29–CA–23593 and 29–CA–23895

July 19, 2002

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND BARTLETT

On July 30, 2001, Administrative Law Judge Eleanor MacDonald issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified[2] and set forth in full below.

The judge found that the Respondent violated Section 8(a)(5) and (1) when it unilaterally stopped making payments to the Union's health and welfare fund, dealt directly with employees over their health insurance, and granted and rescinded a wage increase without giving the Union notice or an opportunity to bargain. The judge also found that the Respondent violated Section 8(a)(1) by informing employees that the wage increase was being rescinded because of the possibility that the Union would file an unfair labor practice charge. Although we agree with the judge's findings of the above unfair labor practices, we find that two issues warrant further discussion.

1. In its exceptions, the Respondent contends that because it had not signed the 1997–2000 collective-bargaining agreement, it did not violate the Act when, upon expiration of the agreement, it stopped making payments to the Union's health and welfare fund. We find no merit to this exception.

For over 20 years, the Respondent has had a collective-bargaining relationship with the Union. The parties negotiated a collective-bargaining agreement with a term from January 18, 1997, through January 17, 2000, but the draft contract allegedly incorporating this agreement was never executed.[3] Despite its failure to sign the draft contract, the Respondent made monthly payments of $142.50 on behalf of each employee to the Union's health and welfare fund from January 1997 through December 1999. In January 2000, the Respondent, without notice to the Union, stopped making monthly payments to the fund.[4]

The Respondent admits that its practice of making monthly fund payments continued virtually uninterrupted during the 1997–1999 period. As an established practice, the fund contributions became an implied term and condition of employment based on the mutual agreement of the parties. *Keystone Consolidated Industries v. NLRB*, 41 F.3d 746, 749 (D.C. Cir. 1994), citing *Riverside Cement Co.*, 296 NLRB 840, 841 (1989) ("It is well settled that a practice not included in a written contract can become an implied term and condition of employment by mutual consent of the parties."). Any unilateral change in an implied term or condition of employment violates Section 8(a)(5) and (1) of the Act. See *Smiths Industries*, 316 NLRB 376 (1995) (respondent violated Sec. 8(a)(5) and (1) when it unilaterally changed established workplace practice); *Sacramento Union*, 258 NLRB 1074 (1981) (respondent unlawfully changed past practice of job assignments and seniority rights).

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co.*, 335 NLRB 142 (2001). We shall further modify the recommended Order to conform to the judge's findings of fact and conclusions of law as set forth in her decision.

We shall substitute a new notice in accordance with our recent decision in Ishikawa *Gasket American, Inc.*, 337 NLRB 175 (2001).

[3] The Respondent contends that it did not sign the draft contract because it was inaccurate and incomplete. We do not pass on that issue.

[4] The Respondent does not contend that it ceased making the payments on the ground that they were prohibited by Sec. 302(c)(5), which requires that employer payments into union trust funds be detailed in a "written agreement." Indeed, the Respondent continued making payments from January 1997 through December 1999, i.e., after the expiration of the 1994–1997 contract. In any event, the fully-executed 1994-1997 collective-bargaining agreement provided for monthly payments of $142.50 to the Union's health and welfare fund. That is the amount required here. In *Hinson v. NLRB*, 428 F.2d 133, 138–139 (8th Cir. 1970), the court held that the terms of an expired contract, together with the underlying trust agreements, are sufficient to satisfy the requirements of Sec. 302(c)(5). Here, par. 21 of the 1994–1997 collective-bargaining agreement incorporates by reference a "Declaration of the Trust of the Local 485 Health and Welfare Fund dated July 10th 1963" into which health and welfare benefit contributions were made over a period of several years until the Respondent unilaterally ceased making payments in January 2000. In accord with Hinson, we find that the trust fund agreement satisfies the requirement of Sec. 302(c)(5) for a "written agreement" even after expiration of the collective-bargaining agreement on January 17, 1997. See also *Peerless Roofing Co. v. NLRB*, 641 F.2d 734, 735 (9th Cir. 1981).

Having established a 3-year practice of making monthly fund payments, the Respondent changed an implied term and condition of employment when it unilaterally stopped making payments to the Union's health and welfare fund. It is immaterial that the Respondent had not signed the 1997–2000 draft contract, because the Respondent's obligation to maintain the status quo is not based on the draft contract but on the Respondent's own past practice. Accordingly, we affirm the judge's finding that, by unilaterally ceasing to make fund payments, the Respondent violated Section 8(a)(5) and (1) of the Act.

2. In its exceptions, the Respondent contends that it did not violate Section 8(a)(5) and (1) of the Act when it made changes in the employee terms and conditions of employment in October 2000 because, it claims, the parties had reached a valid impasse. We find no merit to this exception.

The judge found that the state of negotiations in October 2000 did not satisfy the factors set forth in *Taft Broadcasting*[5] for finding that an impasse in bargaining existed. Thus, the judge found that as of October 2000 the Union "had not had an opportunity to explore the Respondent's position and to formulate and advance its counterproposals." For the reasons stated by the judge and the additional reasons that follow, we agree that a lawful, good-faith impasse did not exist in October 2000.

It is a violation of Section 8(a)(5) for an employer to make changes in terms and conditions of employment without first bargaining in good faith until impasse is reached. *Alwin Mfg. Co. v. NLRB*, 192 F.3d 133 (D.C. Cir. 1999). In determining whether a good-faith impasse has been reached, the Board can consider whether "the purported impasse is reached in the context of serious unremedied unfair labor practices that affect the negotiations." *Great Southern Fire Protection, Inc.*, 325 NLRB 9 fn. 1 (1997). As the court made clear in *Alwin*, not all unremedied unfair labor practices give rise to the conclusion that an impasse was not a valid one. Only those unfair labor practices that contributed to the parties' inability to reach an agreement can preclude a finding of valid impasse. 192 F.3d at 138.

In *Alwin*, the court identified two alternative ways in which an unfair labor practice can contribute to the parties' inability to reach an agreement. First, an unfair labor practice can increase friction at the bargaining table. Second, by changing the status quo, a unilateral change may move the baseline for negotiations and alter the parties' expectations about what they can achieve, making it harder for the parties to come to an agreement. Id.

[5] *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), enfd. 395 F.2d 622 (D.C. Cir. 1968).

Here, we find that the Respondent's unilateral actions meet the second prong of the *Alwin* test. It is clear from the record that a major issue in the negotiations concerned health and welfare fund payments. Indeed, at the first meeting in January 2000, the Union asked for an increase in the amount of the Respondent's fund payments. The Respondent, on the other hand, in its July 2000 contract proposal, sought a reduction in its monthly contributions to the health and welfare fund. The parties' ability to come to an agreement on this key issue was necessarily impeded by the unfair labor practice the Respondent committed in January 2000 of unilaterally ceasing to make any health and welfare fund payments. The Respondent's unlawful conduct diverted the Union's attention away from negotiations and forced it to file an unfair labor practice charge in June 2000. By September 2000, the health and welfare fund had stopped paying employee claims due to the Respondent's discontinuance of contributions some 9 months earlier. Because the employees were left without health coverage, the Union was under great pressure simply to restore the status quo. Thus, the Respondent effectively moved the baseline for negotiations to a considerably lower level and seriously undermined the Union's bargaining position on an issue being addressed in negotiations.

We find that the proximate result of the Respondent's own unlawful conduct was to make it harder for the parties to come to an agreement. Having found that the Respondent's unremedied unfair labor practice contributed to the parties' inability to reach agreement, we conclude that the parties did not reach a good-faith impasse in October 2000. Accordingly, we find that the Respondent violated Section 8(a)(5) and (1) when it unilaterally changed employee terms and conditions of employment.

ORDER

The National Labor Relations Board orders that the Respondent, Lafayette Grinding Corp., Brooklyn, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Amalgamated Machine, Instrument and Metal Local 485, International Union of Electronic, Electrical, Technical, Salaried, and Machine Workers, AFL–CIO, as the exclusive collective-bargaining representative of the unit employees by failing and refusing to make required contributions to the Union's health and welfare fund.

(b) Implementing and rescinding a wage increase without prior notice to the Union and without affording the Union an opportunity to negotiate and bargain.

(c) Bypassing the Union and dealing directly with employees in the bargaining unit over health insurance in

derogation of the Union's status as exclusive bargaining representative of the employees.

(d) Informing employees that any wage increase will be rescinded because the Union might file an unfair labor practice charge.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All production and maintenance employees, excluding office clerical employees, executive employees and supervisory employees with the authority to hire, promote, discharge, discipline or otherwise effect changes in the status of employees or effectively recommend any such action.

(b) Remit any payments it owes the Union's health and welfare fund, and make whole its employees for any expenses ensuing from the Respondent's failure to make the required fund contributions, in the manner set forth in the remedy section of the decision.

(c) Make the employees whole for any loss of earnings suffered as a result of the unlawful withdrawal of a wage increase. Backpay shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Brooklyn, New York, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 2000.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain with Amalgamated Machine, Instrument and Metal Local 485, International Union of Electronic, Electrical, Technical, Salaried and Machine Workers, AFL–CIO, as the exclusive collective-bargaining representative of our unit employees by failing and refusing to make required contributions to the Union's health and welfare fund.

WE WILL NOT implement and rescind a wage increase without prior notice to the Union and without affording the Union an opportunity to negotiate and bargain.

WE WILL NOT bypass the Union and deal directly with you over health insurance and other terms and conditions of employment in derogation of the Union's status as your exclusive bargaining representative.

WE WILL NOT inform you that any wage increase will be rescinded because the Union might file an unfair labor practice charge.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All production and maintenance employees, excluding office clerical employees, executive employees and supervisory employees with the authority to hire, promote, discharge, discipline or otherwise effect changes in the status of employees or effectively recommend any such action.

WE WILL remit any payments we owe the Union's health and welfare fund, and WE WILL make you whole for any expenses ensuing from our failure to make fund contributions.

WE WILL make you whole for any loss of earnings resulting from the withdrawal of a wage increase, plus interest.

LAFAYETTE GRINDING CORP.

Emily M. DeSa, Esq., for the General Counsel.
Ursula Levelt, Esq. (Kennedy, Schwartz & Cure, P.C.), of New York, New York, for the Charging Party.
Robert M. Ziskin, Esq., of Commack, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

ELEANOR MACDONALD, Administrative Law Judge: This case was heard in Brooklyn, New York, on March 28, April 16 and May 1, 2001. The Complaint alleges that the Respondent, in violation of Section 8(a)(1) and (5) of the Act, threatened an employee because he intended to honor a subpoena served by Counsel for the General Counsel to testify in the instant proceeding, made unilateral changes in wages and terms and conditions of employment and bypassed the Union and dealt directly with its employees. The Respondent denies that it has engaged in any violations of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent on June 22, 2001, I make the following[1]

[1] The record is hereby corrected so that at page 259, line 25 it reads "pension, fund, union dues and I have no contact from anybody from"; at page 267, line 1, the correct amount is 25 cents an hour; at page 278, line 23, the correct amount is 35 cents.

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation with a place of business located at 115 Banker Street, Brooklyn, New York, is engaged in grinding metal plates used for die cutting, laminating, printing machines, printed circuits and aircraft arrays. Annually the Respondent purchases and receives at its Brooklyn facility supplies and materials valued in excess of $50,000 directly from firms located outside the State of New York. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act and that Amalgamated Machine, Instrument and Metal Local 485, International Union of Electronic, Electrical, Technical, Salaried and Machine Workers, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Since at least 1980 the Union has represented the Respondent's employees and there have been a series of collective bargaining agreements covering the following unit:

> All production and maintenance employees, excluding office clerical employees, executive employees and supervisory employees with the authority to hire, promote, discharge, discipline or otherwise effect changes in the status of employees or effectively recommend any such action.

The parties stipulated that in 1999 the Respondent employed 28 bargaining unit employees.

It is undisputed that the Respondent and the Union negotiated a collective bargaining agreement with a term from January 18, 1997 through January 17, 2000. This collective bargaining agreement was never signed. The parties agree that the Respondent remitted dues to the Union from January 18, 1997 through January 17, 2000 and that the Respondent granted the Union access to its facility. There is no dispute that the 1997–2000 contract required the Respondent to contribute to the Local 485 Health and Welfare Fund on behalf of its employees and that the Respondent did make those contributions. However, the Respondent contends that it made the payments until December 1999 while the Union claims that the contributions ceased in November.[2]

The parties disagree as to the wording of the unsigned 1997–2000 contract. As will be discussed below, the Union asserts that the correct contract language is contained in a draft it provided to the Respondent. The Respondent claims that certain additions to that language were agreed to in the negotiations giving it the right to halt Health and Welfare Fund payments if certain conditions were not met.

The parties began negotiations in January 2000 for a new collective bargaining agreement to succeed the unsigned contract ending January 17, 2000. These negotiations will be described below.

[2] The record does not permit a conclusive finding on this issue.

It is undisputed that in October 2000 the Respondent granted its unit employees a wage increase of 25 cents per hour and that after two weeks the Respondent withdrew the 25-cent wage increase.[3] It is undisputed that the Respondent had not given notice to or bargained with the Union concerning the wage increase and that it did not give notice that it was rescinding the increase. The Respondent gave the unit employees a notice dated October 26, 2000 which read as follows:

> This is to inform you that I have been advised by Lafayette Grinding's attorney that I cannot give each of you the raise of $0.25/hr based on a complaint that will be filed against Lafayette by your union. Therefore, as of next week's payroll, your raises will be recinded. (sic)

B. The 1997–2000 Contract Negotiations

Eugene DeJesus is the business manager of Local 485 and the chairman of the trustees of the Local 485 Health and Welfare Fund. DeJesus testified that he negotiated with Gopal Sharma, the president of Respondent, for a successor collective bargaining agreement to the one expiring in January 1997. DeJesus said that after the conclusion of the negotiations in March 1997 he gave Sharma a typed copy of a completed agreement and he made several attempts to obtain Sharma's signature on the contract. But Sharma always gave a reason why he had not yet signed the agreement. Because the Respondent continued to remit dues to the Union and because none of the employees complained to the Union that they were not being paid their correct wages, DeJesus eventually ceased his efforts to obtain Sharma's signature on the document.[4] The Union did not file any charges based on the failure to sign the contract.

DeJesus did not produce a copy of the agreement he gave to Sharma for his signature in March 1997. Indeed, the only copy of the purported 1997–2000 contract in the record is an unsigned contract with handwritten additions made by Sharma which Sharma gave to DeJesus when negotiations for a new contract began in 2000 . This copy has a blank space where the 1997–2000 wage increase provisions should have been inserted. DeJesus testified that the contract he gave to Sharma did in fact contain figures for a wage increase. He stated that the wage increases pursuant to the 1997–2000 contract were 30 cents the first year and 25 cents in each of the second and third years. After the negotiations were completed, DeJesus said, he met with the unit employees and informed them of this provision.

Kermit White, a member of the bargaining unit and the Union's shop steward, testified that he believed that the wage increases for the years 1997–2000 were 45 cents, 35 cents and 30 cents respectively. However, White acknowledged that he was not certain of these figures.

Gopal Sharma, the president of the Respondent, testified that he negotiated with DeJesus for the 1997–2000 collective bargaining agreement. Sharma recalled that DeJesus gave him a typed copy of the contract for signing in the spring of 1997. When Sharma read the draft he saw that various provisions he and DeJesus had agreed upon were not included in the document presented to him by DeJesus. Among the items left out of the draft according to Sharma were provisions that new employees would become members of the Union after a 90 day trial period, that employees would not be paid time and one-half for working Saturday if they were absent without a doctor's note on the following Monday and that employees hired after 1994 had different sick leave and personal leave privileges than employees hired before that date. Furthermore, Sharma stated, the wage increases for the years 1997, 1998 and 1999 respectively were 35 cents, 30 cents and 30 cents.[5] The Union had asked for an increase in the Health and Welfare Fund contribution and, according to Sharma, he and DeJesus agreed on a figure of $142.50 per month per employee. However, the draft contract given to Sharma erroneously put this figure at $150.50 per month. Sharma stated that for some time he had been asking for financial statements from the Fund. Sharma testified that he and DeJesus had agreed that by January 2000 the Fund would provide him with such statements for the last ten years. If he was not given these statements and if he and the Union did not reach agreement on a new contribution rate based on the Fund's financial records, then the Respondent would not be obligated to make any further health and welfare payments after the expiration of the contract in January 2000. The draft contract that DeJesus gave to Sharma did not include any such language. Indeed, the Respondent did not produce any 1997–2000 draft containing this language.

Sharma testified that after he read the draft collective bargaining agreement given to him by DeJesus in 1997 he called DeJesus several times to complain that the language did not reflect their actual agreement. Eventually, Sharma showed DeJesus the problems with the language and gave him a copy with corrections. DeJesus took the corrected copy of the contract and Sharma did not hear from him again until January 2000 when he came to negotiate a new contract. Sharma testified that during the term of the 1997–2000 contract he paid the wages and Health and Welfare Fund contributions as he described them above and he remitted dues and pension payments. The Respondent applied the sick leave and vacation provisions as they had been agreed to in the last round of negotiations.

DeJesus denied that he had agreed to a 90 trial period or to any changes affecting vacations and holidays. He denied discussing any other changes with Sharma. DeJesus specifically denied that he ever agreed that the Health and Welfare Fund would provide Sharma with its financial statements. DeJesus further denied that he agreed that the Respondent could cease making payments to the Fund in the year 2000 until such time as the financial statements were provided and the parties agreed to a new contribution amount.

[3] Again, the record does not disclose the exact date on which the raise was effective.

[4] DeJesus does not know whether the Respondent made the proper pension fund contributions.

[5] Payroll records introduced by the Respondent bear out Sharma's testimony about the amount of the wage increases for the 1997–2000 period.

C. The 2000 Negotiations and Related Events

The Union and the Respondent began meeting in January 2000 to negotiate a successor collective bargaining agreement. At the first meeting the Union presented Sharma with a one-page list of "proposed changes" to the agreement. Without stating any specific amounts, the Union demanded a "substantial wage increase", an "increase in Health & Welfare payments" and other changes in language.

Sharma testified that at the first collective bargaining session in January 2000 the Union asked for increased contributions to the Health and Welfare Fund. Sharma responded that he wanted the Fund's financial statements for the last 10 years. Then, according to Sharma, DeJesus said that the Respondent "should take care of" the employees' health plan.

DeJesus testified that in February or March 2000 Sharma rejected the Union proposal to increase health and welfare payments. DeJesus and shop steward White told Sharma that if he could obtain the same or better insurance for $140 per month he should tell the Union about it. However DeJesus stated that he did not tell Sharma to go ahead and provide a different health insurance plan without discussing it with the Union. DeJesus stated that the Respondent did not propose a specific alternative health insurance plan to the Union during the negotiations. Shop steward White also testified that the Union told Sharma that if he could get the same coverage as was provided by the Welfare Fund at a cheaper rate then he could furnish the health insurance to employees. But White denied that the Union said it did not want to have anything to do with health insurance.[6]

DeJesus attended all the bargaining sessions. He testified that a number of negotiations were held in Sharma's office. A federal mediator who was present at one meeting in March 2000 informed DeJesus that Sharma was offering a 5-cent per hour wage increase.

After a few more negotiating sessions with a mediator, the parties met on July 26 in the offices of the Respondent's then attorney, Robert M. Rosen, Esq. Beginning with this meeting the Union was represented by Ira Cure, Esq. On this occasion the Respondent gave the Union a proposed written contract which provided wage increases of 25 cents per hour in each of five years. The proposal reduced the Respondent's contribution to the Health and Welfare Fund from $142.50 per employee per month to $110 for family coverage and $50 for a single person. Employees who opted out of the Fund would receive a direct payment from the Respondent. The Respondent was given the right to request from the Fund "a complete fiscal report to include salaries paid to various persons and every financial detailed report" going back 15 years and "at anytime in the future". If the report was not provided, the collective bargaining agreement "will be null and void." The proposed contract also provided for a new two-year probation period, deleted the prior terms concerning union security, limited the right to grieve a discharge and made many other changes. The Union did not accept this proposal.

The Health Insurance Issue

According to Sharma, at the July 26, 2000 bargaining session DeJesus said that the employees did not have health insurance coverage.[7] The Union denies that this is so. Yvonne Bourne, the Local 485 Health and Welfare Fund manager testified that even though the Respondent had ceased making the required payments the Fund continued to offer coverage to the unit employees. There is evidence that the Fund continued paying claims for the employees at least until September 2000.

Shop steward White testified that in October 2000 Sharma called him into the office and told him that the Union was not furnishing health and welfare coverage. Sharma said that he would provide employees with insurance and he gave White a GHI application form and a sheet summarizing the benefits for "Small Business Health Insurance." The monthly premium rates listed ranged from $99.80 for an individual to $235.22 for an employee, spouse and children. Sharma instructed White to look over the form. The Respondent stipulated that Sharma gave the same forms and made the same offer to all the other unit employees. White later signed a form declining the insurance offered by the Respondent.

Sharma testified that a number of employees had informed him that the Local 485 Health and Welfare Fund was denying them coverage. To support this claim, the Respondent introduced signed statements from 3 employees dated either September 29 or November 15, 2000 to the effect that the Fund had denied them health coverage beginning January 1, 2000.[8] Sharma testified that based on DeJesus' statement during the negotiations and the fact that employees told him the Fund was no longer covering them he decided to offer the employees a different health plan. He told the employees to give him a written statement that they were being denied coverage. If they did so, he would offer them insurance until the Union gave him the financial records he had been requesting and he agreed on an amount to contribute to the Union's Fund. The Respondent introduced 2 signed statements dated December 21, 2000 from employees stating that they did not want the Union's plan and would rather receive $50 monthly from the employer. The Respondent also produced 2 statements from employees dated December 21, 2000 that they preferred the coverage offered by Lafayette to the Local 485 Health and Welfare Fund.

Sharma testified that he did not actually provide alternative health insurance to any of his employees nor did he pay $50 a

[6] Sharma gave White a statement to sign on November 7, 2000 which quoted DeJesus as saying he "wanted Mr. Sharma to take care of the Health & Welfare benefits and that Mr. DeJesus does not want to get involved." Although White signed this statement he testified that he had misinterpreted the language and that it was not accurate. I credit White. Having observed him carefully I believe that he did not understand the purport of the statement Sharma gave him to sign. I note also that White signed this statement on November 7, 2000 while the purported statement by DeJesus that the Union did not want to be involved in health insurance took place very early in the year.

[7] The Union had filed a charge in Case 29–CA–23593 on June 20, 2000 based on the Respondent's failure to make contributions to the Health and Welfare Fund.

[8] These statements are not worthy of extended discussion. They were not supported by any testimony. One statement is clearly untrue based on documentary proof from the Fund itself and one statement was signed on November 15, weeks after Sharma had already offered the GHI insurance to the employees.

month to any employees who stated that they wished to decline all health insurance coverage.

The Wage Issue

Sharma testified that at the July 26th meeting Cure asked whether the 25-cent raise was the Respondent's final offer. When Sharma said that it was Cure said he would file unfair labor practice charges against the Respondent. On August 16 the Union filed a charge in Case 29–CA–23719 alleging that the Respondent had refused to bargain in good faith by proposing a collective bargaining agreement that was "inherently draconian and regressive." On October 19 Rosen wrote to Cure stating that after extensive discussions with the Board Agent assigned to the case he was proposing that the Union withdraw its charges and that the parties recommence bargaining with the assistance of a Federal mediator. On October 25 the Regional Director approved the withdrawal of the charge in Case 29–CA–23719.

After the July 26 session there were no further meetings until November 2000. In the interim the Respondent granted and rescinded the 25-cent increase described above. On November 2, the Union filed a charge in Case 29–CA–23895 alleging that the unilateral provision of the wage increase was unlawful.[9] It is clear that aside from filing unfair labor practice charges the Union neither told the employer to rescind nor to keep in effect the wage increase that had been granted in October.

Bhailal Sooknanan

Unit employee Bhailal Sooknanan testified that he received a subpoena from the General Counsel and that he was scheduled to testify in the instant hearing on Monday, April 16, 2001. Sooknanan testified that on Friday, April 13 as he was leaving work he told his supervisor, Nicola Cespe, that he had to go to court on Monday. Cespe asked whether Sooknanan would testify against Sharma and Sooknanan replied that he would testify as to what Respondent had done. Cespe told him that his job was in jeopardy. A short time later, Sooknanan gave the subpoena to Sharma in the latter's office. Sharma asked whether Sooknanan would testify against him and Sooknanan replied that he would testify as to what Respondent had done. Sharma asked why Sooknanan was going to court and whether it was because he had been laid off. Sooknanan replied that he was aggrieved because he was laid off twice for not joining Sharma's insurance. Sharma did not tell him that his job was in jeopardy and Sooknanan did not report to Sharma that Cespe had said his job was in jeopardy.

Sooknanan testified that he had been laid off on May 19, 2000 and recalled on July 21. He was again laid off on February 16, 2001 and recalled on March 29.

Cespe denied that he has any supervisory authority. He testified that on April 13 Sooknanan told him he was not coming to work Monday because he would be in court. Sooknanan did not say what court he was going to nor did he mention that it related to the Union or the Respondent. Cespe denied that he said anything about Sooknanan's job being in jeopardy and he denied that he and Sooknanan had any conversation about the Union or the Respondent.

Sharma testified that Cespe was a working foreman and he denied that Cespe was a supervisor. Sharma stated that on April 13 Sooknanan told him he was going to court and that there was no discussion of layoffs during the conversation.

III. DISCUSSION AND CONCLUSIONS

The Respondent urges that in October 2000 it had bargained to impasse with the Union.

It has long been the rule that

> The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed. *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), enf'd 395 F.2d 622 (D.C. Cir. 1968).

As matters stood in October 2000, the bargaining between the Union and the Respondent had been going on since January 2000. Between January and July there seems to have been discussion of general matters pertaining to the cost of health insurance, changes in contract language and a 5 cent per hour wage increase offered by the Respondent. Neither party presented a comprehensive proposal or an actual draft collective bargaining agreement. In July 2000 the negotiations became more concrete and earnest: at the July 26 meeting both sides were represented by attorneys and the Respondent gave the Union a complete proposed written contract. The Union viewed this proposal as regressive and filed an unfair labor practice charge on August 16. No negotiations took place during the processing of the charge but, according to the Respondent's then attorney, there were "extensive discussions" after the filing of the charge and until October 19 seeking ways to resolve the situation. It is clear that the Respondent offered to restart the negotiations on the condition that the charge be withdrawn. Up to this point, there had not been lengthy negotiations of the Respondent's written proposal and no discussion of the Respondent's health insurance offer nor of its many proposed changes in union security, probationary periods, vacations, grievances and the like. The Union had not had an opportunity to explore the Respondent's position and to formulate and advance its counterproposals.[10] By agreeing to restart the negotiations the Respondent seemed to be ready to discuss its proposal and any Union demands. In October the Union would have had every reason to believe that detailed and focused negotiations were about to begin and, indeed, the Respondent sought to convey that impression. However, the Respondent evidenced a lack of good faith because during the very same weeks that that it was ostensibly seeking to settle the unfair labor practice case and to begin to negotiate it was also granting a unilateral wage increase and dealing directly with the employees concerning health insurance. Based on the criteria set

[9] This charge also alleged an unlawful unilateral offer of health insurance to employees.

[10] Compare *E. I. du Pont & Co.*, 268 NLRB 1075, 1076 (1984).

forth in *Taft* I find that there was no impasse between the parties in October 2000.

It is undisputed that the Respondent was required by the 1997–2000 collective bargaining agreement to make contributions to the Local 485 Health and Welfare Fund. The Respondent had been remitting payments of $142.50 per month per employee during the term of the contract. Neither the Union nor the Fund objected to the amount of this monthly remittance. The Respondent's position is that the unsigned contract permitted it to cease payments in the year 2000 if the Fund had not turned over its records to Sharma and there had been no new agreement on the amount to be paid. I find that during the negotiations for the 1997–2000 contract Sharma requested that he be given financial records of the Health and Welfare Fund. To enforce this request, Sharma said that he would stop making payments in January 2000 unless he received the records. However, I do not find that the Union ever agreed to this condition. There is no writing to this effect, even in the unsigned draft, and both DeJesus and White denied that the Union had agreed to this unusual provision. Thus, I cannot find that there was a mutual agreement on this issue.[11] The parties' contract, so far as their conduct evidences the agreement, required the Respondent to pay $142.50 per month per employee to the Health and Welfare Fund. When the contract term ended the Respondent was obliged to refrain from making unilateral changes in the employees' terms and conditions of employment. The Respondent was required to continue making its contributions to the Fund. I find that the Respondent violated Section 8 (a) (5) of the Act by failing to continue its contributions to the Local 485 Health and Welfare Fund. *Kuna Meat Co.*, 304 NLRB 1005, 1012 (1991), enfd. 966 F.2d 428 (8th Cir. 1992).

The uncontradicted testimony shows that in October 2000 the Respondent offered its unit employees GHI Small Business Health Insurance. The Respondent does not claim that it ever proposed this insurance coverage to the Union during the negotiations. Sharma testified, however, that during bargaining in February or March 2000 DeJesus had told him that the Respondent should "take care of" the employees health plan. DeJesus and White both denied this and I have discredited White's November 7 signed statement supporting Sharma's testimony. I credit DeJesus and White that the Union told Sharma that if he could find a more economical plan than the Union Health and Welfare Fund he should tell them about it. I do not credit Sharma's testimony that the Union waived its right to negotiate the employees' health insurance by telling him that he should "take care of it." Nor do I find that there was some kind of emergency. The Local 485 Health and Welfare Fund had continued to cover the employees for some period of time even though the Respondent had unlawfully ceased making the required contributions. The fact that three employees signed statements saying that they had no coverage does not justify bypassing the Union.[12] It was the Respondent itself that created this situation by failing to contribute to the Fund. I find that the Respondent violated Section 8(a)(5) when it bypassed the Union and dealt directly with its employees concerning health insurance.

The record is uncontroverted that Respondent granted a 25-cent per hour wage increase in October 2000 and withdrew it 2 weeks later without notice to or bargaining with the Union on either occasion. In the absence of an impasse the Respondent is not free unilaterally to implement a wage increase, and I find that the Respondent violated Section 8(a)(5) of the Act. *Houston County Electric Cooperative*, 285 NLRB 1213, 1215 (1987). The Respondent informed its employees that it was rescinding the raise because of "a complaint that will be filed by the Union." This was a further unilateral change in violation of Section 8(a)(5) of the Act. An employer violates the Act by representing to employees that the Union stands as an impediment to increases in wages or benefits. *NLRB v. Hi-Tech Cable Corp.*, 128 F.3d 271, 277 fn. 20 (5th Cir. 1997). By its statement to employees that the wage increase was being withdrawn because of the possibility of an unfair labor practice charge the Respondent violated Section 8(a)(1) of the Act. *Diamond Motors, Inc.*, 212 NLRB 820 (1974).

The Respondent's brief states that the Respondent was "confronted with a quandary" after it gave the unlawful wage increase. No such quandary existed. Having acted unlawfully the Respondent was not obliged to commit another unfair labor practice by withdrawing the increase and blaming the Union for this action. The Union did not demand that the wage increase be rescinded and it has long been established that the remedy for granting an unlawful wage increase does not require rescission. *Martin Marietta Energy*, 283 NLRB 173, 177 (1987). Any confusion was of the Respondent's own creation.

The Respondent's brief also argues that the Union has abandoned the unit, ignored the employer's proposals, failed to request bargaining meetings and failed to make any proposals. This preposterous claim is unsupported by the facts in the record and requires no extended discussion. *Pioneer Inn*, 228 NLRB 1263 (1977).

Having observed both Cespe and Sooknanan, I credit the testimony of Cespe. I do not find that Cespe questioned Sooknanan about his testimony and I do not find that he threatened that Sooknanan's job was in jeopardy because he was going to court. There is no indication in the record that Cespe had any knowledge of the proceedings involving the Union and the Respondent. Sooknanan did not testify that he had informed Cespe of the nature of his court appearance. Significantly, when Sooknanan gave Sharma the subpoena he did not report to Sharma that Cespe had just threatened him. Nor did Sooknanan testify that Sharma threatened that his job was in jeopardy because he was going to attend an NLRB proceeding. Sooknanan stated that Sharma only asked whether his testimony related to his layoffs. Thus, I do not find that the Respondent engaged in any violation of Section 8(a)(1) of the Act.

[11] I find that DeJesus and White were more credible witnesses than Sharma. I observed that Sharma was an uncooperative witness: he tried to avoid answering questions when the answer was not favorable to the Respondent's position and he gave contradictory and inconsistent testimony. Sharma frequently exaggerated his testimony to the point where it was unbelievable. Whenever there is a conflict in the testimony of Sharma and other witnesses, I have credited the testimony of the other witnesses.

[12] As noted above, at least two of these statements are spurious.

CONCLUSIONS OF LAW

1. All production and maintenance employees, excluding office clerical employees, executive employees and supervisory employees with the authority to hire, promote, discharge, discipline or otherwise effect changes in the status of employees or effectively recommend any such action, constitute a unit appropriate for collective bargaining within the meaning of Section 9 (b) of the Act.

2. Since 1980 the Union has been the designated exclusive collective bargaining representative of the employees in the unit within the meaning of Section 9(a) of the Act.

3. By unilaterally ceasing to make contributions on behalf of its employees to the Local 485 Health and Welfare Fund the Respondent has violated Section 8(a)(5) and (1) of the Act.

4. By bypassing the Union and dealing directly with its employees concerning health insurance the Respondent violated Section 8(a)(5) and (1) of the Act.

5. By unilaterally granting and then rescinding a wage increase to its employees the Respondent violated Section 8(a)(5) and (1) of the Act.

6. By informing its employees that the wage increase was being rescinded because of the possibility of an unfair labor practice charge to be filed by the Union the Respondent violated Section 8(a)(1) of the Act.

7. The General Counsel has not shown that the Respondent engaged in any other violations of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having failed to make contributions to the Local 485 Health and Welfare Fund it must make whole its employees by reimbursing them for expenses ensuing from its failure to make such contributions, plus interest. *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981). Additional amounts shall be paid to the Health and Welfare Fund in the manner set forth in *Merryweather Optical Co.*, 240 NLRB 1216 fn. 7 (1979). Interest shall be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]